

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

WANDELL JAMES KEY,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2005

No. 252312

Wayne Circuit Court

LC No. 03-008934-01

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced, as a second habitual offender, MCL 769.10, to five to fifteen years in prison for each of the second-degree criminal sexual conduct convictions. We affirm.

Defendant first asserts that defense counsel's failure to excuse a juror who had been a victim of child sexual abuse constituted ineffective assistance of counsel. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Questions of constitutional law are reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness, (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and 3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight. Moreover, a defendant must

overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defense counsel's failure to excuse a prospective juror who was a child sexual assault victim did not deny defendant the effective assistance of counsel. The trial court asked the prospective juror if he could set aside his personal experience and judge this case based solely on the evidence and the law. The prospective juror answered this question affirmatively. The trial court also asked the prospective juror if he could be "just as fair to one side as the other" and the prospective juror answered affirmatively. The trial court also asked the prospective juror if the case in which he was involved as a victim was adjudicated and the prospective juror stated "it never went to trial." An attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which this Court normally declines to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Even so, defendant has failed to demonstrate that, but for defense counsel's conduct, the outcome of the trial would have been different. Testimony at trial established that defendant touched the victim's penis on three occasions. The jury, sitting as the finder of fact, weighed the credibility of all the witnesses and rendered a verdict accordingly.

Defendant next claims that the trial court abused its discretion by making improper statements while conducting voir dire. We disagree.

This Court reviews judicial abuse complaints case by case, to determine whether the defendant received a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court has wide discretion and power in the manner of trial conduct. *Paquette, supra*, p 340. This discretion, however, is not unlimited, and a trial court pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Paquette, supra*, p 350. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). What constitutes acceptable and unacceptable voir dire practice does not lend itself to hard and fast rules. *Tyburski, supra* at 623. Rather, trial courts must be allowed wide discretion in the manner they employ to achieve the goal of an impartial jury. *Tyburski, supra* at 623.

Defendant contention that the trial court invited jurors who were child abuse sex victims to state that they could be fair and impartial is incorrect. Instead, the trial court informed the jury that the fact that some of them may have been sexually abused or heard about others who have been sexually abused did not preclude them from sitting on the jury and rendering a fair and impartial verdict. The trial court further informed the jury that defendant enjoys a presumption of innocence throughout his trial and that the prosecutor bears the burden to prove every element of the crime beyond a reasonable doubt. Finally, the trial court informed the jury that it would be asking them questions to determine whether they would be able to be a "fair judge of the facts." The trial court's comments were well within the discretion afforded it, and did not invite the jurors to state that they could be fair and impartial even though they might believe otherwise. In addition, when a prospective juror indicated that he was a victim of childhood sexual abuse, the trial court did not suggest but instead asked the prospective juror whether he could render a fair and impartial verdict. Defense counsel did not object to the trial court's comments, ask to excuse the juror for cause, or request another peremptory challenge. Moreover, because the entire jury

panel indicated on the record that it could render a fair and impartial verdict, defendant has failed to demonstrate that the trial court's comments during voir dire were outcome determinative.

Defendant's third claim on appeal is that trial counsel's failure to move for a mistrial when a police officer volunteered other similar acts evidence denied him the effective assistance of counsel. We disagree.

During the course of the trial, the prosecution asked the police officer if she was aware that extended members of the victim's family had children. The police officer answered in the affirmative. The prosecution then asked if she gave the victim's mother any instructions as to those family members. The police officer answered affirmatively, and added that "according to them [other family members] there was something filed someplace else as far as I knew." Defense counsel objected and the trial court requested counsel to approach the bench. Defense counsel requested that the answer be stricken from the record and requested the trial court give curative instructions. The prosecution had no objection to either action.

Defense counsel later withdrew his request for the curative instructions and informed the trial court that a defense witness would be produced to rebut the police officer's claim of a prior similar act. The prosecution asked that defense counsel place on the record that this decision was trial strategy. Defense counsel stated, "[i]t's trial strategy, Your Honor." When the prosecution rested, defense counsel did call a rebuttal witness. The witness, a member of the victim's extended family, testified that she took her four-year old to Kids Talk when she heard of the allegations against defendant, but the interviewed yielded no allegations from her child. Defendant has failed to overcome the presumption that defense counsel used sound trial strategy in calling the rebuttal witness in lieu of moving for a mistrial based on the police officer's testimony. Even so, the police officer's answer was nonresponsive to the prosecution's proper question and generally would not have been grounds for granting a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Finally, defendant argues that the cumulative effect of trial errors denied him a fair trial. The cumulative effect of a number of errors may amount to error requiring reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Only actual errors are aggravated to determine the cumulative effect. *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995). On the basis of our above conclusions with regard to the individual claims of error, we find no basis for reversal of defendant's convictions on a claim of the cumulative effect of individual errors.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly